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April 8, 2020

**VIA EMAIL**

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**Re: Demand for Rescission of Illegitimate and Unconstitutional April 7, 2020  
Order of the Health Office of San Bernardino County**

Dear County Supervisors:

This firm, in coordination with the Center for American Liberty, is in the process of being retained by several San Bernardino County residents in connection with the County's adoption and enforcement of the April 7, 2020 Order of the Health Officer of San Bernardino County (hereinafter "Order").<sup>1</sup> For the reasons addressed in this letter, the Order is unconstitutional on numerous grounds. Accordingly, we ask that the County immediately rescind the Order and notify this office and the public of the same by **5:00 p.m. on April 9, 2020**. If the County fails to do so, our client is prepared to file a federal lawsuit in the immediate future, seeking immediate injunctive relief.

**I. The Order's Ban on In-Person Religious Services Violates the First Amendment.**

The First Amendment to the U.S. Constitution prohibits government actors from enforcing any "law respecting an establishment of religion, or prohibiting the free exercise thereof." U. S. Const. amend. I; *see also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (applying the First Amendment to the States through the Fourteenth Amendment). The California Constitution similarly protects freedom of religion. Cal. Const., art. I, § 4. Accordingly, the County cannot ban "faith based services" taking place outside the home without

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<sup>1</sup> As of the date of this letter, the Order is available online at the following URL:  
[http://wp.sbcounty.gov/dph/wp-content/uploads/sites/7/2020/04/SKM\\_C45820040714190.pdf](http://wp.sbcounty.gov/dph/wp-content/uploads/sites/7/2020/04/SKM_C45820040714190.pdf).

first satisfying the most exacting standard of judicial review: strict scrutiny. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (2004).

Under strict scrutiny, the government cannot burden religious activity unless it first establishes (1) a compelling interest for imposing such burdens, and (2) that the burdens are the “least restrictive means” necessary to further that compelling interest. Federal courts routinely enjoin the enforcement of laws and policies under this standard. *See e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 524.

Here, the Order states that faith-based services are permitted only “through streaming or other technology, while individuals remain in their homes, but does not allow individuals to leave their homes for driving parades or drive-up services, or for picking up non-essential items.”<sup>2</sup> The Order makes no exceptions for upcoming religious holidays, including Easter, which is a very important religious observance day to many Christians worldwide. The Order also makes no exceptions for congregates taking extensive protective measures, such as in-person services in which participants are separated by more than six feet, etc. Simply put, there was essentially *no* effort to narrowly tailor the Order so as not to violate individuals’ right to religious freedom. Instead, the County proclaimed its draconian restrictions, essentially blanket-banning participation in religious services for an indefinite period of time, while at the same time allowing other necessary and important movement. As the Order cannot withstand strict scrutiny—or any other form of scrutiny—it must be rescinded immediately.

## **II. The Order Is Overbroad and Chills Religious and Expressive Activity Protected by the First Amendment.**

A statute or regulation is overbroad if it “does not aim specifically at evils within the allowable area of [governmental] control, but ... sweeps within its ambit other activities in ordinary circumstances that constitute an exercise” of protected expression and conduct. *Thornhill v. State of Alabama* (1940) 310 U.S. 88, 97. In *Gatto v. Cty. of Sonoma* (2002) 98 Cal. App. 4th 744, 750, for example, the California Court of Appeal held that the Sonoma County Fair dress code was overbroad and void for vagueness. There, the county ejected the plaintiff from the fair for wearing a jacket adorned with a Hell’s Angel insignia because it was deemed “provocative.” *Id.* at 750. The Court of Appeal held the county’s dress code failed to pass constitutional muster.

Here, the Order broadly prohibits entire swaths of activities, including religious, travel, and speech activities, without any effort to except constitutionally-protected activities. In addition to banning all out-of-home religious activities, the Order requires that all essential workers “wear face coverings, such as scarves (dense fabric, without holes,) bandanas, neck gaiters, or other fabric face coverings, when they leave their homes....”

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<sup>2</sup> We understand the County’s recent statement clarifies that the County will now permit drive-in religious services, although at this time no updated order has been released to the public. <http://wp.sbcounty.gov/cao/countywire/?p=5862>.

Courts consistently recognize that a person’s clothing may contain or constitute protected speech. *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969) 393 U.S. 503. The County’s compulsory wearing of face coverings necessarily inhibits—through prior restraint no less—all expressive conduct related to facial adornments, and may even compel citizens to speak when they would otherwise not. *Janus v. Am. Fed’n of State, Cty., & Mun. Employees, Council 31* (2018) 138 S. Ct. 2448, 2464 [“Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding “involuntary affirmation” of objected-to beliefs would require “even more immediate and urgent grounds” than a law demanding silence.”]. Even where such clothing is not expressive *per se*, the forced dress still violates citizen’s protected liberty interest in choosing their own attire. *See Karr v. Schmidt* (5th Cir.1972) 460 F.2d 609, 621 (dis. opn. of Wisdom, J.) [“[f]orced dress ... humiliates the unwilling complier, forces him to submerge his individuality in the ‘undistracting’ mass, and in general, smacks of the exaltation of organization over member, unit over component, and state over individual.”]. Accordingly, the Order runs afoul of the overbreadth doctrine and is wholly unconstitutional.

### **III. The Order Is Void for Vagueness.**

A regulation is constitutionally void on its face when, as matter of due process, it is so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application” *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115. The void for vagueness doctrine is designed to prevent arbitrary and discriminatory enforcement. *Ketchens v. Reiner* (1987) 194 Cal.App.3d 470, 477. The problem with a vague regulation is that it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis....” *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108–109.

Here, the Order is vague for several reasons, including but not limited to those addressed below.

#### **A. The Order Relies on Absent and Inapplicable Authority.**

The County states that the Order is authorized by California Health and Safety Code Sections 101080 and 101085. This is simply incorrect. Emergency powers exercised pursuant to Section 101085 require that an emergency be declared pursuant to Section 101080, which in turn applies only when “a release, spill, escape, or entry of waste occurs as described in paragraph (2) of subdivision (b) of Section 101075.” Since there is no “release, spill, escape, or entry of waste,” Section 101085 is not applicable, and the Order is void.

The County also states that it relies upon “Executive Order N-22-20” as authority for issuing the Order. As far as we are aware, no such executive order exists.

## **B. Governor Newsom’s Order Requires Only that Persons “Heed” the Public Health Official’s “Stay-at-Home” Notice.**

Governor Newsom’s March 19, 2020 Executive Order N-33-20 appears to be the intended reference mistakenly titled N-22-20 in the Order. Even so, the County brazenly mischaracterizes it.

Contrary to the County’s assertions in the Order, Governor Newsom’s order does *not* state that “all persons residing in the State [are] to remain in their homes or places of residence ...”. A careful reading of the Governor’s order reveals that residents are only instructed to “heed” State public health directives ...”. According to Meriam-Webster, the plain meaning of the word “heed” is “to give consideration or attention to”—not to submit or comply with, as suggested by the County’s interpretation. Governor Newsom’s order that California residents give careful thought to the directives of the Department of Public Health does not equate to an order to comply with those directives.

The Public Health directive itself carries no legal weight, despite nominally “ordering” that all persons not engaging in essential activities stay at home. Under established California law, the Public Health Department cannot forcibly quarantine persons unless there is probable cause that such persons are actually infected. *Ex parte Martin* (1948) 83 Ca.App.2d 164, 167; *Jew Ho v. Williamson* (C.C. Cal. 1900) 103 F. 10 [San Francisco’s quarantine to contain bubonic plague in May 1900 found to be unreasonable]; *Wong Wai v. Williamson* (CC Cal. 1900) 103 F. 1 [holding that San Francisco’s May 1900 quarantine violated rights secured by the Equal Protection Clause]; *see also Ex parte Arta* (1921) 52 Cal.App. 380, 383 [“a mere suspicion, unsupported by facts giving rise to reasonable or probable cause, will afford no justification at all for depriving persons of their liberty and subjecting them to virtual imprisonment under a purported order of quarantine.”]. As such, directives from California public health officials are enforceable only to the extent there exists probable cause that *each* such non-essential worker has contracted Covid-19—which is clearly not the case. Absent such probable cause, the directive has no legally enforceable effect as to any person not shown to be exposed within the meaning of the statute and precedent.

## **IV. The Order Violates the Fundamental Right to Travel.**

The United States Supreme Court has held that the “right to travel is a part of the liberty of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.” *Kent v. Dulles* (1958) 357 U.S. 116, 126. The Court found that “[t]ravel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.” *Id* at 126. They have also ruled that the “right to travel is an unconditional personal right, a right whose exercise may not be conditioned.” *Dunn v. Blumstein* (1972) 405 U.S. 330, 341.

Courts apply the compelling state interest test to assess the constitutionality of the government’s action when that action implicates the fundamental right to travel. *See, e.g., Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250; *Dunn v. Blumstein* (1972) 405 U.S. 330; and *Shapiro v. Thompson*, (1969) 394 U.S. 618. Under the compelling state interest test, the

government must prove that there is a “clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest.” *Dunn* at 341. The *Dunn* Court continued by finding that in order to prove that there is a substantial government interest, the government “cannot choose means that unnecessarily burden or restrict constitutionally protected activity,” that the statute must be “drawn with precision,” and “must be tailored to serve their legitimate objectives.” *Dunn* at 343.

The County fails to satisfy this standard. The County is picking and choosing who can be open and who cannot be open. As such, this order is not narrowly tailored and the fact that the County is not allowing businesses or churches to attempt to practice social distancing clearly shows that the government is not executing a plan that is the least restrictive one possible.

**V. The Mandate to Wear a Mask has a Disproportionate Impact Upon the Poor and Those that Cannot Wear a Mask for Medical or Other Reasons.**

The Order also violates the Equal Protection Clause, by mandating that all persons who leave their places of residence must wear a face covering, disproportionately affecting indigent residents of the County, and those that cannot wear a face covering for legitimate medical or other reasons. Indeed, those without facial coverings cannot exercise fundamental constitutional rights—including leaving their home for essential goods and services—while more affluent individuals may be able to comply. The order does not provide for the provision to purchase such face coverings for those who do not already have suitable masks and are not able to afford them.<sup>3</sup> The Order mandates that everyone use or purchase suitable masks in order to comply with the Order. As such, at a minimum, the County needs to have provisions in place to fund the purchase the applicable masks for those who cannot afford them. It fails to provide for this, and therefore cannot rest the exercise of fundamental rights on people’s ability to afford those rights.

**VI. The Order Fails to Properly Educate the Public on Proper Use of the Mask.**

Finally, the Order seems to be grossly negligent in that it mandates the wearing of cloth masks without any instruction to the public as to how to properly maintain the mask or how often it is to be changed. In light of all the contradictory evidence being presented on mask use, if the County is going to mandate it, they owe a duty to the general public to ensure that along with the order, proper instructions are given as to how to use and maintain the mask for public health.

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<sup>3</sup> In other contexts, for example, California law prohibits schools from imposing a dress code on children unless there are adequate provisions to “assist economically disadvantage pupils”. Educ. Code § 35183(d). Likewise, employers who mandate that an employee must wear a uniform are required to pay for that uniform. Labor Code § 2802.

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In conclusion, for the foregoing reasons, we feel that the Order is defective and needs to be immediately rescinded in order to limit the County's liability for violations to residents' constitutional rights. Our firm is preparing the necessary paperwork to file a temporary and permanent restraining order. Failure to rescind this order by the end of business on April 9<sup>th</sup> will result in a lawsuit being filed.

Regards,

A handwritten signature in blue ink that reads "Harmeet K. Dhillon". The signature is fluid and cursive, with the first name being the most prominent.

Harmeet K. Dhillon